REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 61 of 2007

STEPHEN ICHWARA .... APPELLANT

VERSUS

REPUBLIC ………………………………………………………….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.2535 of 2006 of the Chief Magistrate's Court at Kibera by M. Maundu – Senior Resident Magistrate)

JUDGMENT

The appellant was convicted for the offence of Robbery with violence **contrary to section 296 (2) of the Penal Code**. The trial court then sentenced him to death.

In his appeal to the High Court, he has asserted that he ought not to have been convicted because the evidence tendered by the prosecution had numerous contradictions.

An example of the alleged material contradictions was that whereas the complainant said that the thugs had inflicted injuries on his head and shoulder, the doctor who examined the complainant did not find signs of any injury to the complainant's head.

Another alleged contradiction is that whereas **PW 1** saw 4 intruders, **PW 2** only saw one intruder, yet those two witnesses were together.

A third example was that the witnesses testified having heard the robbers uttering different words.

Furthermore, because it was not clear about the exact words which the intruders uttered, the appellant argued that that gave rise to doubts about any alleged voice recognition.

The other issue raised by the appellant was about the failure by the trial court to indicate the language in which the plea was taken, as well as the language in which the trial proceedings were conducted.

It was the contention of the appellant that he was therefore deprived of his right to be tried in a language which he understood.

In any event, because the trial was presided over by a magistrate other than the one before whom the plea was taken, the appellant said that the learned trial magistrate ought to have taken the plea again. As far as Mr. Wandugi, the learned advocate for the appellant, was concerned, the practice of the court is to have plea taken by the magistrate before whom the trial commences. Therefore, he submitted that the failure to give effect to that practice rendered the proceedings irregular.

Another irregularity is said to have arisen when the trial court put the appellant to his defence immediately after the prosecution had closed its case.

Thereafter, the trial court indicated that it would give later, its ruling on the issue of whether or not the appellant had a case to answer.

The said sequence of events is said to demonstrate that the trial court did not take the proceedings seriously. By so doing, the court is said to have caused the appellant to be prejudiced. We were therefore invited to hold that the proceedings were irregular.

The other issue that was raised by the appellant was that although **PW 4** testified that **PW 1** had identified the appellant by name, and that the name was recorded in the O.B, the prosecution failed to produce the said O.B before the trial court. As the appellant was not arrested until after 3 weeks from the date of the robbery in question, he asserted that that made it vital to have the O.B. produced in evidence, if the alleged recognition was to be verified.

In reply to the appeal, Ms Maina, learned state counsel, submitted that although there were several inconsistencies, the same did not prejudice the appellant.

The respondent summarized the prosecution case, pointing out that both **PW 1** and **PW 2** had recognized the appellant, through his voice. Furthermore, **PW 1** also saw the appellant and recognized him.

In the statements recorded by the witnesses, and which were provided to the appellant, it was clear that **PW 1** and **PW 2** did give to the police the appellant's name when they first reported the incident.

As regards the language used at the trial, the respondent said that the witnesses testified in Kiswahili. Thereafter, the appellant is said to have cross-examined the witnesses. Therefore, the respondent submitted that the appellant must have understood the language in which the proceedings were conducted.

The particulars of the charge against the appellant were that the appellant was together with other persons, who were not before the court, when they committed the offence. They were armed with pangas, which were described as dangerous weapons.

They not only robbed the complainant **(PW 1),** but they also used actual violence on him.

The Plea was taken on 8th May 2006. However, it is not indicated on the record whether the plea was taken in English or Kiswahili.

On 22nd May 2006 the appellant asked the court that he be supplied with witness statements. He also informed the court that he was unwell.

The court ordered that the witness statements be made available to the appellant. The court further ordered that the appellant be taken for treatment.

From that interaction, we can safely conclude that the court and the appellant were able to

communicate effectively.

Thereafter, the prosecution witnesses testified in Kiswahili, and each of them was then cross-examined by the appellant.

Later, the appellant also testified in Kiswahili and was then cross-examined.

As Kiswahili was the language of choice for the appellant, and because the witnesses testified in that language, we find that the failure by the trial court to specify that the appellant did understand that language, did not prejudice the appellant.

The incident in question took place at 1.00a.m. Both **PW 1** and **PW 2** were asleep. They were woken up by the sounds of the door being broken down. The door was made of wood.

PW 1 testified that four (4) men entered into their house. And, contrary to the appellant's contention, **PW 2** did not say that only one person entered. He said:

"There were about five people who entered in the house. All of them had torches."

Both **PW 1** and **PW 2** said that one of the men entered into the bedroom which the two witnesses were using. That man attacked both witnesses using a panga. As he attacked them, he also demanded money.

Both **PW 1** and **PW 2** testified that **PW 1** was close to the window, and that outside the house, the security lights were on. Soon, the two witnesses heard someone shouting outside the house.

PW 1 heard the person say;

"Toa Pesa"

However, **PW 2** said that the person said;

"Toeni Pesa; Nyinyi munacheza na watu hapa. Toeni pesa."

Whilst it is true that the witnesses did not give the same words, as having been uttered by the man who was outside, we are satisfied that the witnesses both recalled that that person demanded money from them.

In effect, the alleged inconsistency is not material. We so find because voice recognition is not dependant on the exact recollection of the words uttered by the suspect.

But even if there was any doubt about the alleged voice recognition by both **PW 1** and **PW 2**, it is noteworthy that **PW 1** looked outside the window, and he then saw the appellant.

The security lights were on, and the appellant stood infront of the main door. He was facing **PW 1**, and he had not covered his head.

In our considered view, the circumstances prevailing were conducive for positive identification. Indeed, because **PW 1** had known the appellant for about 2 months, this was a case of recognition.

But if the appellant had been recognized, why was he not arrested immediately after the incident?

PW 1 explained that the appellant, who had been working as the Landlord's "Shamba-boy", stopped working. **PW 1** did not know where the appellant went to.

Three weeks later, and by sheer coincidence, **PW 1** saw the appellant within the Uthiru area. Although **PW** 1 took the police to that area on the following day, the appellant had again moved on. **PW 1** heard that the appellant had moved to Kangemi.

In effect, the appellant was not arrested soon after the incident because he went underground. The delay in having him arrested was not attributable to the lack of recognition or of identification.

As regards the appellant's contention that the learned trial magistrate ought to have taken plea again, just before the prosecution witnesses started testifying, the court asked Mr. Wandugi advocate to point out the relevant statutory provision. He said that that was a rule of practice.

Although it may be true that some courts do have such a practice, we find that the said practice had not gained such notoriety as to acquire the status of obligation.

The court did take plea once. And although the trial was later presided over by a magistrate other than the one before whom the plea was taken, we hold that the learned trial magistrate had no obligation to take plea again. Therefore, the failure to have plea taken a second time was not an error, nor did it occasion any prejudice to the appellant.

After the prosecution closed its case, the learned trial magistrate immediately declared that the prosecution had established a prima facie case against the appellant.

Notwithstanding that declaration, the trial court appears to have subsequently indicated that it would deliver its ruling at a later date. As far as the appellant was concerned, that demonstrated a clear lack of seriousness on the part of the trial court.

On 18th January 2007, the prosecution closed its case.

Immediately thereafter, the learned trial magistrate delivered a ruling in the following terms;

"I find that the prosecution has established a prima facie case against the accused person to warrant him to be put on his defence."

The court noted that **section 211 of the Criminal Procedure Code** had been duly complied with. Thereafter, the appellant informed the court that he would give an unsworn defence, and also that he would not call any other witnesses.

The record of the proceedings shows that after the appellant had informed the court about the manner in which he wished to go about the defence case, the learned trial magistrate then fixed the case for "Ruling" on 26th January 2007.

As the court had already delivered its ruling, it did not make any sense for it to be fixing another date for the same ruling.

We therefore perused the original hand-written records, to ascertain whether or not there was an error in the typing. Our efforts revealed that the word "Ruling" was not written down by the trial court. The actual word is "Defence."

And when the trial resumed on 26th January 2007, as had been scheduled, the Court actually confirmed that what was due to proceed on that day was the "Defence hearing".

In the circumstances, we find nothing to support the appellant's contention, that the trial court did not take the proceedings seriously.

The appellant confirmed, on oath, that he used to live on the same plot as the complainant. He also

confirmed having lived in Kangemi at the time he was arrested. Furthermore, he confirmed that before shifting residence to Kangemi, he lived at Kabete Veterinary servant's quarters.

Thus the appellant corroborated the prosecution case about having shifted from the scene of crime after the incident took place. He also confirmed that the complainant was not a stranger to him.

That would explain why the complainant was able to give to the police, the name of the appellant. The Investigating officer testified that the appellant's name was recorded in the O.B. at Kabete Police Station. It is the complainant **(PW 1)** who had identified the appellant by name, at the time he reported the robbery.

Thereafter, it was the complainant who led the police in the search for the appellant.

Whenever **PW 1** encountered the appellant, he immediately informed the police.

By the naming of the appellant in his first report and by thereafter drawing the attention of the police to the whereabouts of the appellant when he encountered him thereafter, the complainant demonstrated a definite clarity of focus on the person whom he undoubtedly saw and recognized during the robbery.

But how come **PW 1** did not see exactly what **PW 2** saw, yet they were inside the same house at the time of the robbery?

Both those witnesses explained that the complainant **(PW 1)** was standing next to the window, whereas **PW 2** encountered one of the robbers at "the bedroom door". Thereafter, **PW 2** sat down, whereas **PW 1** stood next to the window.

Clearly, therefore, because the two witnesses were either sitting or standing at different spots within the house, they did not view the happenings from the same perspective. That explains why the two of them did not necessarily see similar things during the robbery. That does not render their evidence either inconsistent or contradictory.

But what about the injuries allegedly suffered by **PW 1**; were they corroborated by the doctor?

In particular, the appellant asserted that the doctor who examined **PW 1** did not find any injuries to the complainant's head. On the other hand, **PW 1** had alleged that one of the robbers had inflicted an injury to his head, using a panga.

Dr. Kamau testified that **PW 1**;

> ***"had a scar on the left temporal area and on top***
>
> ***of the left shoulder."***

According to the "Chambers Concise Dictionary" one of the meanings of the word "temporal" is;

"Belonging, relating or close to the temples on either side of the head."

The temples are the two flat parts of the head, at either side of the forehead, above the cheekbones.

Clearly, therefore, when the doctor talked about scars on the left temporal area, he was expressly corroborating the evidence of the complainant, about an injury inflicted to his head.

Having re-evaluated all the evidence on record, and also having taken into account all the submissions made before us, we are satisfied that the prosecution produced sufficient evidence to prove that **PW 1** was robbed. At the time of the robbery, the security lights outside the house were on, and they enabled **PW 1** to clearly see the appellant, who was standing outside the house. Having seen the

appellant, **PW 1** verified the identity of the person who was shouting at the occupants of the house, to surrender their money. That person was well known to him, as he had been working for the Landlord.

The appellant did also confirm that he was not a stranger to **PW 1**. Indeed, he confirmed that he used to live in the same plot as the complainant **(PW 1).**

In effect, this was a clear case of recognition.

The defence did not shake the case that had been put forth by the prosecution. Therefore, we find no merit in the appeal. The same is thus dismissed.

We uphold both the conviction and the sentence.

Dated, Signed and Delivered at Nairobi, this 12th day of June, 2012.

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FRED A. OCHIENG **L.A. ACHODE**

JUDGE **JUDGE**